Court File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation,

APPELLANTS,

- and -

HER MAJESTY THE QUEEN in right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region,

RESPONDENTS,

- and -

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PART I –STATEMENT OF FACTS

1. The Gitanyow Hereditary Chiefs ("GHC") adopt the facts as set forth in Part I of the Appellant's Factum, and set forth the following additional facts.

2. The Gitanyow are an Aboriginal people of Canada. They assert Aboriginal rights, title, and governance to territory in northwestern British Columbia on the basis that they have traditionally owned, occupied, and used that territory.[1]

3. Since well before contact and continuing to the present, the Gitanyow have, similarly to the Gitxsan,[2] organized themselves geographically, politically, legally and economically according to their House system. Every Gitanyow person belongs to a House or Wilp. Each Wilp has its own territory and a Hereditary Chief (Simooyghet) who is responsible for its political and economic affairs. The Hereditary Chiefs hold and manage their Wilp's resources and property on behalf of the Gitanyow people. They are responsible for doing so in accordance with Gitanyow law (Ayookxw). Traditionally, the Hereditary Chiefs demonstrate their power and authority (daxgyet) in feasting, gift-giving, and maintenance of their crests (ayuuks) through the raising of totem poles (git'mgan).[3]

4. Reflecting the fact the Gitanyow Wilps are individually responsible for looking after their own territories, individual Wilps and their Hereditary Chiefs have taken three different cases to court in the past 15 years to protect their particular territories.[4]

5. On the most recent occasion, in *Wii'litswx*, one of the main goals was to establish and enforce the Crown's legal duty to reasonably accommodate the Gitanyow Wilp system, including their territorial boundaries, in the replacement of six forest licences. Neilson, J. (now J.A.) held:

> I am satisfied on the material before me that the Wilp are an integral and defining feature of Gitanyow's society. As such, the Wilp system and the related aboriginal rights attract

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[1] *Wii'litsxw v British Columbia (Minister of Forests)*, 2008 BCSC 1139 at 20 [*Wii'litsxw*].
[2] For a general description of the Gitxsan, see *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 8 & 12-14 [*Delgamuukw*].
[3] *Wii'litsxw* at 22-24.
[4] *Luuxhon v. Canada*, [1999] 1 C.N.L.R. 66; *Gwasslam v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 & 2004 BCSC 1734; and *Wii'litswx* (2008).

> the protection of s.35 of the *Constitution Act*, and the honour of the Crown required that they be reconciled with Crown sovereignty by being reasonably accommodated.[5]

PART II – STATEMENT OF THE GHC's POSITION ON THE QUESTIONS

6. The GHC limit their argument to the first question raised by the Appellant concerning the British Columbia Court of Appeal's decision in this case regarding the proper test for proof of Aboriginal title.

7. The Appellant argues, on various grounds, that the Court of Appeal erred by creating a new test for proof of Aboriginal title at odds with this Court's jurisprudence. The GHC agree and provide further reasons not canvassed by the Appellant for requesting that this Court reject the Court of Appeal's approach.

8. Briefly the GHC say that the Court of Appeal introduced new factors, largely extraneous to the common law perspective on physical occupation, into the test for proof of Aboriginal title that serve to devalue the role of the Aboriginal perspective in the process of evaluating an Aboriginal title claim and, in so doing, rendered differences in Aboriginal peoples' perspectives on their occupation of their lands prior to the Crown's assertion of sovereignty inconsequential to definition of the geographic extent of their titles.

PART III – STATEMENT OF THE GHC's ARGUMENT

A. *Delgamuukw* on the Proof of Occupancy and Aboriginal Title

9. The parties on appeal to this Court in *Delgamuukw* advanced conflicting positions on what an Aboriginal group had to prove to establish occupancy sufficient to ground title:

> There was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim to aboriginal title. However, the parties disagreed on how that occupancy could be proved. The respondents assert that in order to establish aboriginal title, the occupation must be the physical occupation of the land in question. The appellant Gitksan nation argue, by contrast, that aboriginal title may be established, at least in part, by reference to aboriginal law.[6]

10. Rather than resolving the conflict simply by taking sides, the former Chief Justice explained that since each side's position possessed legitimacy in light of the dual source of

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[5] *Wii'litswx* at 222.
[6] *Delgamuukw* at 146.

Aboriginal title, a dialectic of common law and aboriginal perspectives should be built into the proof of occupancy:

> This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.[7]

11. Had this Court accepted the position that only the common law's perspective on an Aboriginal group's presence on the land at sovereignty is material to the proof of occupancy, it would have meant for the Gitxsan and others, including the Gitanyow, not only that the geographic extent of their titles would have been more narrowly circumscribed but also that the areas thus delimited would have been minor remnants or fragments - from the Aboriginal perspective, mere simulacra - of larger areas formerly occupied as wholes in accordance with their indigenous laws, tenure systems, and concepts of property, ownership and stewardship.

12. The former Chief Justice referenced this Court's earlier decision in *Van der Peet* to explain that the incorporation of this dialectic of perspectives within the proof of occupancy is mandated by s. 35(1) and the goal of *true* reconciliation:

> This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet*. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the "aboriginal perspective while at the same time taking into account the perspective of the common law" and that "[t]rue reconciliation will, equally, place weight on each".[8]

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[7] *Ibid.* at 147.

[8] *Ibid.* at 147. Note that Lamer C.J. was referring to para. 50 in his reasons for judgment in *R. v. Van der Peet*, [1996] 2 S.C.R., where he said:

> It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only *fair* and *just* reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. *True* reconciliation will, equally, place weight on each. [emphasis added]

13. Continuing his reference to *Van der Peet*, he observed that since an Aboriginal group's traditional laws inform their perspective on the occupation of their lands, their laws in relation to their lands at sovereignty are relevant to proving occupation sufficient for title:

> I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[9]

B. *Marshall; Bernard* on the Proof of Occupancy and Aboriginal Title

14. Observing that *Delgamuukw* had left for future development many of the details of how the test for aboriginal title applied to particular circumstances, this Court in *Marshall; Bernard* expressly took on the task of elaborating the standard of occupation required to prove title.[10]

15. In its preliminary remarks on common law Aboriginal title, this Court reaffirmed *Delgamuukw* on the overall requirement that "in analyzing a claim for aboriginal title, the Court must consider both the aboriginal perspective and the common law perspective."[11]

16. It also reaffirmed *Delgamuukw* on the specific requirement that the dialectic of perspectives must be incorporated into the analysis of physical occupancy, saying, "The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law."[12]

17. One way in which this Court in *Marshall; Bernard* filled in some of the details and thus developed the *Delgamuukw* test for Aboriginal title was by clarifying how the dialectic of perspectives should function within a court's analysis of a title claim.

18. As preliminary to its clarification of how this dialectic functions within the analysis of a title claim, the Court first clarified how it functions generally in the evaluation of an Aboriginal rights claim:

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[9] *Ibid.* at 148.
[10] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at 40 [*Marshall; Bernard*].
[11] *Ibid.* at 46.
[12] *Ibid.* at 70.

> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it.[13]

19. Affirming that the dialectic of perspectives is not tilted to the common law side, thus rendering the Aboriginal perspective of no consequence, the Court then explained how, in the translation process, courts must accommodate the Aboriginal perspective at the front end in forming their understanding of the Aboriginal practice ("take a generous view"), at the back end in identifying a matching common law right ("not insist on exact conformity"), and overall by not conducting the translation process "in a formalistic or narrow way".[14]

20. In the case of aboriginal title in particular, the Court stated:

> It is established by aboriginal practices that indicate possession similar to that [possession] associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective.[15]

21. To determine whether any particular set of aboriginal practices indicate such possession, the Court directed that judges must look for the indicia "in the aboriginal culture at issue."[16]

22. As for the common law approach to possession, the Court had this to say:

> The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed.... The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically....[17]

23. Citing *Delgamuukw*, the Court noted that physical occupation "... may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of

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[13] *Ibid.* at 48.
[14] *Ibid.* See also paras. 50 and 69.
[15] *Ibid.* at 54.
[16] *Ibid.* at para. 61. See also para. 69.
[17] *Ibid.* at 54.

fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources."[18] It further observed in regard to Aboriginal title, "Typically, it is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources...".[19]

C. The BC Court of Appeal's Departure from this Court's Jurisprudence

24. The GHC submit that the Court of Appeal advanced an approach to the proof of Aboriginal title fundamentally at odds with this Court's jurisprudence. The GHC use the word "fundamentally" because, they submit, the Court of Appeal undid the equipoise and thereby the dialectic of perspectives on occupation established by this Court at the centre of the proof of title. They add, as a matter of considerable concern to them, that the Court of Appeal's approach renders differences between Aboriginal peoples' perspectives on their pre-sovereignty occupation, including their laws and tenure systems, of no meaningful consequence to the geographic extent of their titles.

25. The GHC note first that in regard to the geographic extent of Aboriginal title, the Court of Appeal said: "The law must recognize and protect Aboriginal title *where* exclusive occupation of the land is critical to the traditional culture and identity of an Aboriginal group."[20] The projection of this purpose onto Aboriginal title is at odds with *Delgamuukw*, where Lamer C.J. held that, because it is "a right in land", Aboriginal title "confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies."[21] An Aboriginal group's traditional culture is not a constraint on its collective freedom to use its title land as it sees fit, including for modern economic purposes.[22] The continuation of its traditional culture is not, therefore, determinative (in whole or part) of the geographic extent of an Aboriginal group's title.

26. Having projected this purpose onto Aboriginal title, it was a small step for the Court of Appeal to conclude that since the recognition of other Aboriginal rights would go far "to

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[18] *Ibid.* at 56.
[19] *Ibid.* at 70.
[20] *William v. British Columbia*, 2012 BCCA 285 at 172 (emphasis added), (*William*). See also paras. 231 & 232.
[21] *Delgamuukw* at 111.
[22] *Ibid.* at 166 & 169.

preserve the rich traditions of the Tsilhqot'in people," the Appellant had no need of title to more than some specific and closely circumscribed sites.[23]

27. The GHC submit that incorporating the question of how much title land is "critical" to an Aboriginal group's traditional culture in the evaluation of a title claim diminishes the role of the Aboriginal perspective in the analysis, potentially to the point of irrelevancy or - from Gitanyow's perspective on their lands, including their laws and Wilp system - absurdity, where what remains is exemplified by salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, and such.[24]

28. The GHC note further that the Court of Appeal assumed that if a definite tract of land to which an Aboriginal group claims title is divisible into smaller definite tracts, which qualify as "site-specific",[25] the group can only prove physical occupation of the whole by proving physical occupation of each of the parts. The upshot is that on the Court of Appeal's view, not only must Aboriginal title be demonstrated on a site-specific basis,[26] it must, in consequence, be demonstrated part-by-part for title to be proved to a larger whole.

29. What is more, since larger definite tracts of land will seldom, if ever, be exhaustively divisible into parts that would qualify in the Court of Appeal's estimation as "site specific", part-by-part demonstration will seldom, if ever, result in proof of title to the larger whole. Once this is understood, it is predictable that the Court of Appeal would draw the conclusion that Tsilhqot'in title, if it exists, exists as "a network of specific sites ... connected by broad areas in which various identifiable Aboriginal rights can be exercised."[27]

30. But more importantly - particularly for the Gitanyow who organize themselves on the land according to their Wilp system and thus to which "the network of specific sites" conception of title bears no resemblance or relevance -, it is equally predictable that any court adhering to the Court of Appeal's approach would conclude similarly for any other Aboriginal people.

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[23] *William* at 232.
[24] *Ibid.* at 221.
[25] *Ibid.* at 223, 224, 225 & 230.
[26] *Ibid.* at 224 & 230.
[27] *Ibid.* at 238.

31. Although the Court of Appeal claimed the support of the majority of this Court in *Marshall; Bernard* for its reductionist view of Aboriginal title,[28] its claim hinges on seeing the majority as holding that it was not open to the Mi'kmaq defendants to try to prove - as they did try to prove - common law Aboriginal title to the cutting sites by proving that their ancestors exclusively occupied larger areas encompassing the sites *because* proof of title to the larger areas required them first to prove that their ancestors exclusively occupied the smaller sites. This is not, the GHC say, a credible interpretation of the majority's reasons.

32. The GHC submit that the Court of Appeal's reductionist view of Aboriginal title is inconsistent with this Court's insistence that the evaluation of Aboriginal title claims must incorporate the dialectic of common law and Aboriginal perspectives. Because they undermine this dialectic, the Court of Appeal's rigid and narrow assumptions about the potential geographic extent of Aboriginal title serve to deform the translation exercise described by this Court in *Marshall; Bernard* and subvert s. 35(1)'s high aim of *true* reconciliation identified by the Court in *Delgamuukw*.

33. For the Gitanyow, the implications of the Court of Appeal's approach to Aboriginal title, and in particular to the dialectic of common law and Aboriginal perspectives, are significant and serious. Simply put, on the Court of Appeal's approach, the Gitanyow perspective on the occupation of their land at sovereignty, including their Ayookwx (law) and Wilps (tenure system), makes no real difference to the definition of the geographic extent of Gitanyow Aboriginal title as compared to the definition of the geographic extent of any other Aboriginal group's title.

34. The GHC submit that Aboriginal people did not live a fragmented existence on their lands prior to European contact or assertion of sovereignty. The Aboriginal occupation of Canada involved an integration of geography, politics, law, economics, etc. It is as true of the Gitanyow as it is of any other Aboriginal people. Among the Aboriginal rights that have come to be associated with s.35(1), only Aboriginal title reflects in a unified way the integrated nature of the geographic, political decision-making, legal and economic aspects of Aboriginal peoples' prior occupation. For the Gitanyow, this integration is expressed in their Wilp system. The Court

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[28] *Ibid.* at 224 & 225.

of Appeal's ungenerous approach to the geographic extent of Aboriginal title risks stunting the political, legal and economic potentialities of modern Aboriginal life. Its suggestion that the adverse cultural consequences of its restrictions on the geographic extent of Aboriginal title can be offset by recognizing other Aboriginal rights to the larger non-title area ignores the reality that the non-title lands on which these Aboriginal rights are exercised cannot be integrated with the political, legal and economic aspects of the Aboriginal group's life. The more Aboriginal peoples are forced to carry on their collective lives on these lands, to define their actions thereon simply as hunting, fishing or similar rights, and to experience their lives on these lands as nothing more than aggregates of distinct activities, the more their lives and cultures will be fragmented.

35. Finally, the GHC submit that while it is accurate to say that the Court of Appeal's approach to the proof of Aboriginal title devalues the Aboriginal perspective in the evaluation of Aboriginal title claims, it appears to devalue it more by rigid and narrow assumptions about Aboriginal title's possible geographic extent - resting on the Court of Appeal's stance on reconciliation and this Court's decisions in *Delgamuukw* and *Marshall; Bernard* - than by an emphasis on the common law perspective. Indeed, the GHC submit further, perhaps counterintuitively, that it may even be the case that the Court of Appeal's approach also devalues the perspective of the common law and hence its potential to contribute to the fair and just reconciliation of Aboriginal people's prior occupation of Canada with Crown sovereignty.

PART IV – COSTS

36. The GHC seek no costs and ask that no costs be ordered against them other than additional disbursements occasioned to the Appellants or Respondents by this Intervention.

PART V – ORDER SOUGHT

37. The GHC request permission to present oral argument at the hearing of the appeal.

38. The GHC respectfully submit that the appeal should be allowed and that this Court grant a declaration that the Tsilhqot'in Nation holds Aboriginal title to the Proven Title Area lands within the Claim Area, in accordance with the reasons of the Trial Judge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2013.

for
Peter R. Grant

Michael Lee Ross

PART VI – TABLE OF AUTHORITIES

CASE LAW	Cited at Paragraph(s)
Delgamuukw v. The Queen, [1997] 3 SCR 1010	
R. v. Marshall; R v. Bernard, [2005] 2 SCR 220	
Wii'litswx v. British Columbia (Minister of Forests), 2008 BCSC 1139	
William v. British Columbia, 2012 BCCA 285	